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In The

Supreme Court of the United States

October Term, 1972

No. 72-1084

STANLEY PAUL SCHU,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on March 15, 1973, refusing a Writ of Error, not be granted.

OPINION BELOW

The judgment of the Supreme Court of Virginia is not reported as it was a refusal of the writ of error without opinion and it is contained in the Appendix to the Petition for a Writ of Certiorari as Appendix A.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Section 54-524.101(a) Code of Virginia 1950 (1967 Repl. Vol., 1971 Cum. Supl.) permitting intent to distribute marijuana to be established merely by evidence of quantity is unconstitutional on its face and as applied to this case.

2. Whether the Virginia Drug Control Law classifying marijuana as a controlled drug, possession of which is a crime as is possession of narcotic drugs is unconstitutional.

3. Whether the arrest of the defendant herein was illegal, thereby voiding the subsequent search and seizure.

4. Whether the search incident to the arrest, assuming arguendo that the arrest itself was legal, exceeded the constitutionally permissible scope and area, thereby rendering the search illegal.

5. Whether there was sufficient evidence to support a conviction of possession of marijuana with intent to distribute.

STATUTES INVOLVED

The relevant constitutional and statutory provisions are set forth in full in the Petition for a Writ of Certiorari at pages 2 through 4 and as Appendix B.

STATEMENT OF THE CASE

On September 2, 1971, Donald N. Clements, Special Agent for the U.S. Treasury Department assigned to the

U.S. Customs Agency Service at Tucson, Arizona, received certain information from an informer. The informer, whose identity was not revealed (Tr. 25), telephoned Clements sometime between midnight and 12:20 A.M. and told him that "there was a suitcase aboard American Airlines Flight 246 which departed Tucson at 12:01 A.M."; and that the suitcase, bearing baggage check number "419849," had "a very strong odor of marijuana about it." The informer further told Clements that an individual traveling under the name of "Paul Mitchell" had checked the suitcase; and that the suitcase would be transferred from American Airlines Flight 246 at Chicago, Illinois, to United Airlines Flight 706 which was scheduled to arrive in Norfolk, Virginia at 10:55 A.M. on the same date (Tr. 14, 15, 48).

The informer gave no description of the suspect except that he appeared to be approximately 22 years of age (Tr. 15). Although the informer did not see any quantity of marijuana, his information was based upon what he smelled (Tr. 33).

Clements, who had worked approximately twelve years in law enforcement, including 6 years as Special Agent for the U.S. Treasury Department, met the informer while working at the Tucson International Airport approximately 6 months prior to September 2, 1971, and had seen him on almost a daily basis (Tr. 30, 11). Clements, who had prior experience working with humans detecting marijuana by smell along the Mexican border while a member of the U.S. Border Patrol, had discussed the smell and appearance of marijuana with the informer and was convinced that the informer knew what marijuana looked and smelled like and that his information was reliable (Tr. 11, 31, 50, 51 53). Clements, himself, had smelled marijuana through suitcases before and he felt the informer understood

the nature of the type of information that was required (Tr. 32, 50).

The informer's reliability was established by the fact that he had given information on at least four previous occasions which had led to arrests and the seizure of over 160 pounds of marijuana based upon the odor of marijuana being detected in packages or other objects (Tr. 12, 13).

Clements, acting on the information received from the informer, immediately telephoned Special Agent John Martsh, of the Bureau of Narcotics and Dangerous Drugs, who was liaison agent between the Nogales District (Arizona) of the Customs Agency and the corresponding District of the Bureau of Narcotics and Dangerous Drugs (Tr. 15, 16). Clements related the information to Agent Martsh.

Clements then made another telephone call to Baltimore, Maryland, and advised the Assistant Special Agent in Charge for Enforcement, one Edward H. Lisle, of the information that he had received (Tr. 16).

Lisle, who had over thirteen years of service with the U.S. Customs Agency Service, was familiar with Clements, having read his reports and talked with him on numerous occasions. His memorandum reflected that among the information received from Clements was that "Mitchell" was carrying three pieces of luggage and that bag number "419849" contained a "quantity" of marijuana (Tr. 63, 64, 66).

At approximately 8:30 A.M. on the morning of September 2, 1971, Lisle telephoned Mark Woods, Special Agent of the U.S. Treasury assigned to the Customs Agency in Norfolk, Virginia and advised him of the same information. Lisle also placed a telephone call to Steven Sabel at the local office of the Bureau of Narcotics and Dangerous Drugs in Baltimore, Maryland (Tr. 64).

Upon receipt of the same information, Mark Woods

called Special Agent George Notel of the Bureau of Narcotics and Dangerous Drugs in Norfolk and Sergeant Porter Richardson of the Narcotics Squad of the Norfolk Police Department. These men, together with John Farley, of the Bureau of Narcotics and Dangerous Drugs in Norfolk, met at the Norfolk Airport in anticipation of the arrival of the plane from Chicago (Tr. 78).

Farley dressed as an employee of United Airlines and thereby was able to go out to the plane when it first arrived and to locate the bag with the baggage check number in question. Thereafter the agents were able to follow the bag to the airport facilities until an individual, identified later as the defendant, appeared at the baggage claim area, picked up the bag in question without any hesitation, along with the other luggage, and summoned a Red Cap to assist him (Tr. 81, 134, 166).

The Red Cap placed the bag and the other luggage on his cart in the defendant's presence and carried them outside, accompanied by the defendant (Tr. 81). As the defendant went up to a taxi cab and was giving the driver instructions as to where he wanted to go—"I have several places to go" (Tr. 167)—with the Red Cap standing nearby with the luggage on his cart, Sergeant Richardson identified himself and asked the defendant if he was "Paul Mitchell." The defendant turned around, and upon being asked again by Sergeant Richardson if his name was "Paul Mitchell" responded in the affirmative. The defendant was thereupon arrested and taken into physical custody, and the bag in question was seized off the cart beside the defendant (Tr. 81, 82, 171).

Immediately upon being arrested, the defendant was advised of his legal rights and taken into the police office at the Norfolk Airport. Thereupon, the bag in question was opened upon the defendant furnishing the key, and a large

quantity of marijuana, approximately 39 pounds, was found therein (Tr. 98, 211).

The petitioner was thereafter convicted of possessing marijuana with intent to distribute in the Corporation Court of the City of Norfolk, Virginia on October 4, 1972, and was sentenced to serve fifteen (15) years in the Virginia State Penitentiary with six (6) years of that term of confinement suspended.

ARGUMENT

I.

The Petitioner's Arrest In The Instant Case Was Based On Probable Cause And Was Therefore Legal And The Subsequent Search Of The Petitioner's Luggage Incident To That Arrest Was Proper And Legal.

The crucial question raised in questions 3 and 4 in the petition for a writ of certiorari, which are herein consolidated for purposes of argument, is whether knowledge of the previously related facts and circumstances gave Sergeant Porter Richardson of the Norfolk Police Department's Narcotics Squad sufficient information as to constitute probable cause to believe that the petitioner had committed or was committing a felony in violation of Virginia law in accordance with the Fourth Amendment. If probable cause existed, the arrest, although without a warrant, was lawful and the subsequent search of the petitioner's suitcase and the seizure of the 39 pounds of marijuana contained therein was validly made incident to a lawful arrest and the petitioner's motion to suppress the evidence was properly overruled in the Corporation Court for the City of Norfolk, the marijuana was properly received in evidence at the trial and the action of the Supreme Court of Virginia in refusing a Writ of Error was similarly proper (*Weeks* v. *United States,* 232 U.S. 383 (1914);

Carroll v. *United States*, 267 U.S. 137 (1925); *Draper* v. *United States*, 358 U.S. 307 (1959)).

It is well settled that a police officer may make a warrantless arrest for an offense committed in his presence and a warrantless arrest is similarly lawful if the police have probable cause to believe that an individual is committing a felony or has committed a felony (*Brinegar* v. *United States*, 338 U.S. 160 (1949)). The basic questions presented in this case are whether the arresting officer could properly combine and utilize the totality of the existing circumstances in judging the existence of probable cause and whether such circumstances do in fact in "sum total" constitute probable cause. It is the position of the respondent herein that both of these questions should be answered in the affirmative.

The broad test of probable cause is whether the facts and circumstances within the knowledge of the arresting officer, and for which he had reasonably trustworthy information, were sufficient, in themselves, to warrant a man of reasonable caution to believe that an offense has been or is being committed (*Brinegar* v. *United States, supra; Carroll* v. *United States, supra*, 267 U.S. at 172). The validity of the arrest must be determined by its reasonableness in the light of the circumstances of the particular case (*Brinegar* v. *Untied States, supra*, 338 U.S. at 167).

Mr. Justice Douglas, writing for the Court in *Henry* v. *United States*, 361 U.S. 98 (1959) said that "probable cause exists if the facts and circumstances known to the office warrant a prudent man in believing that the offense has been committed" (361 U.S. at 102). In *Dixon* v. *United States*, 296 F.2d 427 (D.C. Cir. 1961), the Court held that "the decisive factors are that all the circumstances are to be considered together, in a sum total" (296 F.2d at 428).

There seems to be no doubt that even the tip of an

anonymous informer may be properly considered as a relevant ingredient to the mix which will later be viewed for a determination as to the existence of probable cause (*Mills* v. *United States,* 196 F.2d 600 (D.C. Cir. 1952); *DeBruhl* v. *United States,* 199 F.2d 175 (D.C. Cir. 1952)). Your Honors recently held in the case of *Spinelli* v. *United States,* 393 U.S. 410 (1969), that although a reliable informant's tip may meet neither of the two pronged tests of *Aguilar* v. *Texas,* 378 U.S. 108 (1964), Your Honors went further to state that "this is not to say that the tip was so insubstantial that it could not properly have counted in the magistrate's determination. Rather, it needed some further support." In short, the tip of an informer, standing alone, may not be sufficient to constitute probable cause but when viewed along with the totality of the circumstances, it may yet be considered as a relevant factor. The rationale for such a conjunctive approach was set forth by Chief Justice Burger, while sitting on the United States Court of Appeals for the District of Columbia, in *Christensen* v. *United States,* 259 F.2d 192 (D.C. Cir. 1958), when he said:

> "We cannot view the advance 'tip' information and the observations of the police detective in two separate, logic-type compartments. Neither one standing alone would constitute probable cause, but together they composed a picture meaningful to a trained, experienced observer."

From the foregoing it becomes manifest that there is no set formula or criteria to be followed or applied in determining whether probable cause existed within the meaning of those terms as clearly expressed in *Draper* v. *United States, supra.* That question must be resolved from consideration and analysis of all of the facts and circumstances when viewed in their totality. In the case at bar, the "sum

total" consisted of information from two separate sources—information given to the arresting officers by a reliable informer who had been proven to be reliable in the past, and the corroboration of relevant details of the informer's tip by the direct observation of the arresting officer and others. In *Spinelli* v. *United States, supra,* Your Honors stated that "the detail provided by the informant in *Draper* v. *United States,* 358 U.S. 307, provides a suitable benchmark" in determining whether the informer was credible or his information reliable (393 U.S. at 416). In *Draper* the informant reported that the suspect had gone to Chicago the day before by train and that he would return to Denver on one of two specified mornings carrying 3 ounces of heroin. The informer further described Draper's dress, the bag he would be carrying and his unusually fast gait. The Court in *Spinelli* concluded that a magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way. Mr. Justice White, in his concurring opinion in *Spinelli,* stated that such detailed information is self-verifying and "may sometimes imply that the informant himself had observed the facts" (393 U.S. at 425).

In the present case there is a wealth of detail. Not only were the suitcase and airline flight numbers described with specificity, but the informer went on to state that the defendant, who appeared to be approximately 22 years old, was traveling under the name of "Paul Mitchell" and that both the defendant and the suitcase with baggage check number "419849" would arrive in Norfolk, Virginia, at approximately 10:55 a.m. on the same date the informer gave his information. The experience and expertise of the officers assisting in the arrest of the defendant are likewise important factors in assessing the existence of probable cause.

Donald Clements, who received the information initially from the informer had previously been employed by the Border Patrol prior to being sworn as a special agent for the Treasury Department assigned to the United States Custom Service Agency in Tucson, Arizona. Clements had worked with individuals detecting marijuana by smell along the Mexican border and testified that the use of humans had proven effective and the odor of marijuana was distinctive and often detected by customs inspectors, customs agents and other individuals, including himself. Clements further testified that he had known the informer personally for approximately 6 months prior to the receipt of this information and he had dealt with the informer on almost a daily basis. He had discussed the smell and appearance of marijuana with the informer and on at least four previous occasions during April, May and August of 1971, the informer had given information leading to the arrest of several individuals and the seizure of over 160 pounds of marijuana based upon its "strong odor." The informer had never given any false information *and all* of his tips had resulted in successful arrests and seizure of quantities of marijuana. Transmission of the information in question went through experienced investigators and law enforcement officers involved in efforts to break up the drug traffic with the federal government and with the Norfolk Police Department, this Court held in *Brinegar* "in dealing with probable cause, as the name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act." The quantum of information which constitutes probable cause must be measured by the facts of each particular case and it is basic that an arrest, with or without a warrant must stand upon firmer grounds than mere suspicion, although the ar-

resting officer need not have in hand evidence which would suffice to convict. All information in the officer's possession, fair inferences that may be drawn therefrom and the observations made by them are pertinent and relevant. The experience and expertise of each of the agents involved in this case are an important factor in assessing the existence of probable cause.

The law has always recognized the right to search incidental to an arrest (*Abel* v. *United States,* 362 U.S. 217 (1960)). The reasons for such a search are to protect the arresting officers, to prevent escape or suicide and to prevent the destruction of evidence (*Chimel* v. *California,* 395 U.S. 752 (1969)). Sergeant Richardson, acting upon the information received from a reliable informer and the corroboration of this information by direct observation, had reasonable grounds to believe that the suitcase in question contained a quantity of marijuana in violation of Virginia's drug control act and that as evidence in contraband it was threatened with immediate removal or destruction. At the time of the arrest, Sergeant Richardson was unsure as to whether or not there were any additional suspects assisting the defendant at the airport and the search was made contemporaneous with the arrest. As Your Honors stated in *Chimel, supra,* an officer may, incidental to a valid arrest, search the arrestee's person and that limited area within the arrestee's immediate control and from which he may be able to reach a weapon or destroy evidence. In the case at bar, the petitioner had claimed a suitcase at the baggage claim area of the airport and at the time of arrest he was standing beside the red cap and with immediate control over the suitcase at the time of the arrest. In *Abel* v. *United States, supra,* Your Honors held that it was proper to search a suitcase being carried by the defendant and in *Christiansen* v. *United States, supra,* Your Honors held it was proper

to search a small brown paper bag on the floor next to the defendant as a search incident to lawful arrest. Consequently, it is respectfully submitted that the arrest and search and seizure in the instant case were all proper and in accordance with the Constitution.

II.

There Was Sufficient Evidence In The Instant Case To Support A Conviction Of Possession Of Marijuana With Intent To Distribute And The Court Properly Considered The Quantity Of Marijuana As An Element In Deducing Whether There Was An Intent To Distribute.

The petitioner herein relies quite heavily upon the action of the Supreme Court of Virginia in the case of *Sharp* v. *Commonwealth,* 213 Va. 269, 192 S.E.2d 217 (1972), striking down a portion of § 54-524.101(a) of the Code of Virginia (1950), as amended, which allowed for a conviction of possession with intent to distribute a drug which may be based solely upon evidence as to the quantity of the drug. However, *Sharp* did not hold that quantity may not be considered as an element of proof of intent to distribute. All *Sharp* did was to eliminate a presumption based upon quantity.

The more recent decision of the Supreme Court of Virginia in *Hunter* v. *Commonwealth,* 213 Va. 569, ... S.E.2d ..... (1973), pointed out this distinction when the Court said:

> "*Sharp* did not hold that quantity cannot be considered as an element of proof of intent to distribute. Intent necessarily must be proved by circumstances. Quantity, when considered in context with other circumstances, is a circumstance which may have significant probative value. *See United States* v. *Childs,* 463 F.2d 390 (4th Cir. 1972). Indeed, quantity, when greater than the supply ordinarily possessed by a nar-

> cotics user for his personal use, is a circumstance which, standing alone, may be sufficient to support a finding of intent to distribute." (213 Va. at 570)

The United States Court of Appeals for the Fourth Circuit in the *Childs* case, cited in the *Hunter* decision, stated:

> "Intent is not susceptible of direct proof; it must be proved by circumstances. The circumstances establishing such intent in a narcotic prosecution may properly consist of the quantity of the product involved, the nature of its packaging, and other relevant facts. The circumstances in this case, including the quantity, method of packaging, false name of addressee, and other facts, were more than sufficient to justify the submission of the issue of intent to distribute to the jury. People do not normally order a 30-pound trunk load of marijuana for personal use, especially when packaged as this shipment was."

In the case of *Turner* v. *United States,* 396 U.S. 398 (1969), Your Honors held that "evidence of possession of 275 glassine bags of heroine proved beyond a reasonable doubt that Turner was distributing heroin in violation of 26 U.S.C. § 4704(a)." 396 U.S. at 424; see also *United States* v. *Ortiz,* 445 F.2d 1100 (10th Cir. 1971).)

III.

Virginia's Classification Of Marijuana As A Controlled Drug In § 54-524.80, Code Of Virginia (1950), As Amended Is Constitutional.

Your Honors have previously been presented with a similar question to this one in the appeal filed in the case of *Kenneth Michael Smith* v. *Commonwealth,* Record No. 72-1438, in which the argument was being made that Virginia's classification of marijuana as a narcotic drug in former § 54-487(14) of the Code of Virginia (1950), as

amended, was unconstitutional. That classification had been under the old Uniform Narcotic Drug Act and it merely defined cannibas as a "narcotic drug" and then punished all narcotic drugs similarly. Virginia's new statutory scheme punishes marijuana as a controlled drug but treats it as a hallucinogen rather than as a narcotic drug, a much more scientific basis for treating marijuana than the prior treatment in the Uniform Narcotic Drug Act. However, in the *Smith* case, Your Honors entered an order on June 11, 1973, in which you stated that "the appeal is dismissed for want of a substantial federal question." It is respectfully submitted that the action of this court in the *Smith* case is controlling as to the question presented herein and the allegation raised here is without merit.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 27th day of September, 1973, I mailed three copies of the foregoing brief for the Respondent in Opposition to the Granting of a Writ of Certiorari to Stanley E. Sacks, Esquire, Sacks, Sachs and Tavss, First and Merchants National Bank Building, Norfolk, Virginia 23510, counsel of record for petitioner.

ROBERT E. SHEPHERD, JR.
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